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STATUTE CITED

28 U.S.C., section 1254(1) 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 760

HUGO V. LOEWI, INC., A CORPORATION,

Petitioner,

vs.

KILIAN W. SMITH

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Hugo V. Loewi, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case of January 31, 1951 (R. 376).

Opinions Below

The Memorandum Decision of the District Court (Geschwill R. 33) is unreported. The opinion of the Circuit Court of Appeals is reported in 186 Fed. 2d 858 (R. 367).

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1951 (R. 376). A petition for rehearing was denied on April 18, 1951 (R. 377). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

1. Whether under the Uniform Sales Act a seller may maintain an action for the price where the goods tendered do not meet contract specification.

2. Whether under the Uniform Sales Act a seller may maintain an action for the price where the contract provides that in a case of breach the measure of damages shall be the difference between market price and contract price.

Statute Involved

The pertinent provisions of the Uniform Sales Act are printed in Appendix A.

Statement

This litigation involves the rights of buyer and seller under a typical hop sale contract and is of critical importance in determining the future course of the hop industry.

The petitioner, Hugo V. Loewi, Inc., a New York corporation, was a buyer under such a contract. The respondent, the seller, is an Oregon hop producer. The contract of sale was entered into on August 19, 1947 (R. 10-28). It made provision for quality (R. 11), price (R. 11, 12), picking advances (R. 13), and measure of damages (R. 15).

On August 27, 1947 the buyer advanced $3,000 (R. 88, 89, 113) to the seller to enable him to harvest his crop. This he did, and forwarded samples thereof to the buyer in New York (R. 232, 233). Upon their receipt the petitioner

advised his Oregon representative that the hops were blighted and not acceptable (R. 88, 90, 249, 315). Further samples were taken, and the seller notified that the hops were not of contract quality (R. 88, 93, 266, 318). Thereupon, they were rejected (R. 88, 91).

Upon rejection the seller commenced this action for the contract price in the Circuit Court of the State of Oregon (R. 2, 9, 28). The action was removed to the United States District Court for the District of Oregon (R. 34, 35).

The contract involved hops

> "not affected by spraying or mold, but of prime quality, in sound condition, of good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition" (R. 11).

The trial court did not find the hops of prime quality. Nor did it find the hops unaffected by mold (R. 48-55). It found instead that the hops were "merchantable" (R. 54). It found, too, that the hops as delivered were no more blighted or mildewed than when the buyer contracted to purchase or when it elected to make its advance (R. 53).

The contract also provided

> "that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages" (R. 15).

The trial court held that under Oregon law, the measure of plaintiff's recovery was the amount due under the contract, less, of course, the advance payment (R. 55).

On appeal, the court below affirmed the judgment of the District Court, emphasizing that the picking advance was made with the buyer's knowledge that the hop crop showed some mildew.

While the appeal in the instant case was pending, *Steiner* v. *Hill,* 52 Or. Adv. 57, 226 Pac. 2d 307 (Jan. 17, 1951) was decided in the Supreme Court of the State of Oregon. There, as here, the dispute involved the standard hop sale contract. There, too, the hops were mildewed and blighted. The buyer instituted action to recover its picking advance. The seller counterclaimed for the price on the theory that the plaintiff by making advances with the knowledge that the hops on the vine showed mildew waived contract specifications concerning quality. The Oregon Supreme Court held, however, that the seller could not maintain his counterclaim for price. Judgment was entered for the buyer.

On the basis of this decision and others of the Supreme Court of Oregon expressing views contrary to those enunciated by the Court of Appeals, the buyer in the instant case petitioned the Court of Appeals for a rehearing. It was denied on April 1, 1951, Judge Pope dissenting (R. 377).

Meanwhile, the seller in the *Steiner* case petitioned the Supreme Court of the State of Oregon for a rehearing on the basis of the decision in the court below. This was denied on April 25, 1951.

The parties to this action, by the terms of the contract, provided that in case of breach by either party the remedy of the aggrieved party was an action for damages for the difference between market and contract price (R. 15). The trial court permitted recovery of the price. The court below sustained this recovery on the theory that the contractual measure of damages was not the exclusive remedy available to the seller.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that under the Uniform Sales Act a seller may maintain an action for the contract price where the goods tendered do not meet contract specification;

2. In holding that under the Uniform Sales Act a seller may maintain an action for the price where the contract provides in case of breach the measure of damages should be the difference between the market price and contract price;

3. In applying the doctrine of substantial performance to a contract for the sale of goods;

4. In affirming the judgment of the District Court.

Reasons for Granting the Writ

1. The decision of the Court of Appeals is in direct conflict with the recent decision of the Supreme Court of Oregon in *Steiner* v. *Hill,* 52 Or. Adv. 57, 226 Pac. 2d 307 (Jan. 17, 1951), rehearing denied April 25, 1951.

In the *Steiner* case the seller tendered hops which were mildewed and blighted. Hops mildewed and blighted were tendered in the instant case (R. 53). Both contracts call for hops not affected by mold, and are alike in all material respects. In the one case the Supreme Court of Oregon denied recovery because the hops were mildewed. In the other, the Court of Appeals has permitted recovery of the contract price on the theory that the tender of mildewed hops constituted substantial performance of the contract. Upon the fundamental principle involved, the two courts are in irreconcilable conflict.

2. The decision of the Court of Appeals is in direct conflict with that of the Supreme Court of Oregon in *Daniels* v. *Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958.

The question there involved was the measure of damages. The contract provided that it should be the difference between the contract price and the market value of the kind and quality of the hops specified by the contract. The court limited the seller to this amount. In this case, too, the measure of damage provided is the difference between the

contract price and the market price. The court below permitted recovery of the contract price.

3. The doctrine that a contract for the sale of goods of certain specifications can be satisfied by the tender of goods which do not meet the specifications but which the court holds substantially conform to these specifications, and the doctrine that the remedy of either party in the event of breach fixed specifically by the terms of the contract is not exclusive, are revolutionary.

4. The hop growing industry constitutes a major segment of the economy of the Pacific Coast, particularly of the States of Oregon and Washington. The farmers who raise crops are for the most part unable to finance the planting, growing and harvesting of the crops. The dealers advance tremendous sums to the growers for that purpose and enter into contracts for the purchase of crops when finally harvested.

The type of contract in general use, such as the one involved in the instant case, covers every conceivable situation which knowledge and experience can foresee. Its purpose is to fix the rights and remedies of the parties in all circumstances. The decision of the Court of Appeals has created uncertainty where none previously existed. This is harmful to both seller and buyer. The conflict between the Supreme Court of Oregon and the Court of Appeals should be corrected.

ARGUMENT

I

The Doctrine of Substantial Performance Has No Application to a Contract for the Sale of Goods

The parties to the contract involved in the instant case provided for the purchase and sale of hops of *prime quality not affected by mold* (italics ours) (R. 11). The court

devoted much time to the consideration of what is meant by prime quality and attributed no importance to the provision that the hops were *not to be affected by mold.* We are not able to subscribe to the theory that prime quality hops may mean less than that, depending upon whether the crops tendered conformed to the average blighted crop of a particular year. In any event, however, we cannot escape the admitted fact that the hops tendered and rejected were affected by mold. They were found "merchantable," not prime (R. 54).

It has been long established that where the parties have specified the character and quality of the merchandise for which they have contracted, the court may not inquire as to the materiality of their specifications. Nothing less than strict compliance will satisfy. *Filley* v. *Pope,* 115 U. S. 213; *Norrington* v. *Wright,* 115 U. S. 188. That the hops were "merchantable," as found by the trial court, is conceded. They were in fact merchantable, but only as second or third grade hops. Brass too is merchantable, but not as gold. The effect of the decision is not only that the purchaser must accept something less than his contract called for, but must pay for more than he received. This application of the doctrine of substantial performance to a contract for the sale of goods marks a radical departure from fundamental principle of contract law. It would be little short of tragic to engraft such a doctrine upon the law of sales. There is neither reason nor excuse to do so. Truly, "hard cases make bad law."

The Supreme Court of Oregon in *Steiner* v. *Hill,* 52 Or. Adv. 57, 226 Pac. 2d 307, when faced with a contract and factual situation in all material respects identical to that in the instant case, reached a contrary result. The sole difference between that case and this lies in the fact that here the seller claims substantial compliance with the terms

of the contract, and in the *Steiner* case the seller claimed waiver of strict performance. The law as announced by the Supreme Court of Oregon should prevail.

See also:

Lilienthal v. *McCormick*, 86 Fed. 100 (Circuit Court for District of Oregon);

Wright v. *Rand*, 41 Or. 285, 68 Pac. 731;

Netter v. *Edmunson*, 71 Or. 604, 143 Pac. 636.

II

A Seller May Not Maintain an Action for the Contract Price Where the Goods Tendered Do Not Meet Contract Specifications and Have Been Rejected for That Reason.

Under the Uniform Sales Act, as under the common law, the remedy of the seller for breach of contract by the buyer in the failure to accept merchandise tendered in accordance with the terms and specifications of the contract, is an action for damages. The measure of damages is the difference between the contract and market price at the time and place of delivery. In rare and exceptional cases an action for the price will lie. This is not such a case.

The trial court sustained the action for the price on the theory that title had passed. Since this was clearly erroneous, the Court of Appeals was unable to accept that view and expressly disregarded the question of passing of title. However, the Court of Appeals reached the same result by treating an action as if it were one for damages, although it was not tried on that theory, nor did the plaintiff present any evidence on the subject. So treating the action, it was held that the measure of damage was contract price less the advances made. Thus the plaintiff was permitted to recover the contract price for merchandise which neither the trial court nor the Court of Appeals would find complied with the terms of the contract.

III

Where Buyer and Seller Agree to Limit Damages in the Event of Breach by Either to the Difference Between Market Price and Contract Price, Seller May Not Maintain an Action for the Price under the Uniform Sales Act.

In this case, the parties agreed

> "that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages." (R. 15)

Despite this clause, the seller recovered the entire contract price.

Suit for the price is permitted by the Uniform Sales Act in certain circumstances. But the Uniform Sales Act expressly recognizes the right of parties to enter into contracts modifying the rights and liabilities created by that Act. Sec. 71, Uniform Sales Act, Sec. 71-171 O. C. L. A. Though this was conceded by the court below, it ignored the measure of damages provided for by contract and applied a remedy of the Uniform Sales Act.

In one and only one circumstance would a court be justified in ignoring the contractual measure of damages. This would be proper only if the measure affixed was so unreasonable as to constitute a forfeiture or penalty. But that the remedy here provided was reasonable, there is no question. Indeed, it is almost identical to that stated in Section 64 of the Uniform Sales Act, Sec. 71-164, O. C. L. A. This contract provision merely selected one of the remedies provided by law and excluded others. The Uniform Sales

Act expressly contemplates this type of provision, and this and similar provisions have uniformly been sustained. See:

Daniels v. *Morris*, 65 Or. 289; 130 Pac. 397; 132 Pac. 958;

International Milling Co. v. *North Platte Flour Mills*, 119 Neb. 325; 229 N. W. 22;

Crandall Engineering Co. v. *Winslow Marine Ry. & Ship Building Co.*, 188 Wash. 61; Pac. 2d 136.

Conclusion

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ARTHUR B. HYMAN,
Counsel for Petitioner.

KERR & HILL,
Of Counsel.

APPENDIX "A"

Section 71 of the Uniform Sales Act, Section 71-171, O. C. L. A.:

"Where any right, duty or liability would arise under a contract to sell or a sale by implication or law, it may be negatived or varied by express agreement or by a course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

Section 64 of the Uniform Sales Act, Section 71-164, O. C. L. A.:

"(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."